RESPONSE REQUESTED

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NUMBER 89-156

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE, et al.,

Petitioners,

v.

EDWARD J. & DEBORA A. DAVENPORT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a restitution obligation to repay wrongfully received funds, imposed as a condition of probation in a state criminal proceeding, is a claim that may be provided for under Chapter 13 of the Bankruptcy Code.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW.....i

TABLE OF AUTHORITIES.....iii

STATEMENT OF THE CASE.....2

REASONS WHY THE PETITION SHOULD BE DENIED.....3

I. No Conflict Among The Circuits Is Created By The Ruling Of The Court Of Appeals.....3

II. The Court Of Appeals Correctly Ascertained The Intent Of Congress To Allow Debtors To Provide For Restitution Obligations In Chapter 13 Bankruptcy Cases.....7

CONCLUSION.....18

TABLE OF AUTHORITIES

PAGE(S)

CASES

Barnette v. Evans,
673 F.2d 1250 (11th Cir. 1982).....6

Garcia v. United States,
469 U.S. 70 (1984).....7

In re Barnett,
15 B.R. 504 (Bankr. D.Kan. 1981).....4

In re Brown,
39 B.R. 820 (Bankr. M.D.Tenn. 1984)..4

In re Cancel,
85 B.R. 677 (N.D.N.Y. 1988).....3

In re Cullens,
77 B.R. 825 (Bankr. D.Colo. 1987)....4

In re Hackney,
83 B.R. 20 (Bankr. N.D.Cal. 1988)....3

In re Heincy,
78 B.R. 246 (Bankr. 9th Cir. 1987)
rev'd on other grounds, 858 F.2d
548 (9th Cir. 1988).....3

In re Holder,
26 B.R. 789 (Bankr. M.D.Tenn. 1982)..4

In re Hudson,
9 B.R. 363 (Bankr. N.D.Ill. 1981)....4

In re Johnson-Allen,
871 F.2d 421 (3d Cir. 1989).....3

In re Kohr,
82 B.R. 706 (Bankr. M.D.Pa. 1988)....4

In re Newton,
15 B.R. 708 (Bankr. N.D.Ga. 1981)....9

In re Norman,
95 B.R. 771 (Bankr. D.Colo. 1988)....4

In re Rimgale,
669 F.2d 426 (7th Cir. 1983).....14

In re Robinson,
776 F.2d 30 (2d Cir. 1985),
rev'd on other grounds sub. nom.
Kelly v. Robinson, 479 U.S. 36
(1986).....3

In re Taite,
76 B.R. 764 (Bankr. C.D.Cal. 1987)...9

Kelly v. Robinson,
479 U.S. 36 (1986).....2,9,14,16

Mansell v. Mansell,
109 S.Ct. 2023 (1989).....7,15

Matter of Davis,
691 F.2d 176 (3d Cir. 1982).....5

McDonald v. Burrows,
731 F.2d 294 (5th Cir. 1984),
cert. den. 467 U.S. 852 (1984).....6

U.S. v. Alexander,
743 F.2d 472 (7th Cir. 1984).....4

U.S. v. Carson,
669 F.2d 216 (5th Cir. 1982).....4

Younger v. Harris,
401 U.S. 37 (1971).....5

STATUTES

11 U.S.C. §101(4)(A).....8

11 U.S.C. §523(a)(2)(A).....6

11 U.S.C. §523(a)(6).....16

11 U.S.C. §523(a)(7).....11,15

11 U.S.C. §726(a)(4).....13

11 U.S.C. §1325(a)(3).....13

11 U.S.C. §1325(a)(4).....13

11 U.S.C. §1325(b)(1)(B).....13

11 U.S.C. §1328(a).....7,12,15

18 Pa.C.S.A. §1106.....10

62 P.S. §481(c).....16

LEGISLATIVE HISTORY

H. Rep. No. 595, 99th Cong., 2d Sess.
309, reprinted in U.S. Code Cong. &
Admin. News 5787, at 5963, 6266.....9

S. Rep. No. 989, 95th Cong., 2d Sess.
21-22, reprinted in 1978 U.S. Code
Cong. & Admin. News 5787, 5807-08.....9

OTHER AUTHORITIES

5 COLLIER ON BANKRUPTCY, ¶1328.01 at 1328-4 (15th ed. 1988).....14

Galaway, Toward the Rational Development of Restitution, in RESTITUTION IN CRIMINAL JUSTICE, 77, 80-81 (Hudson & Galaway, eds. 1977).....17

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Edward J. and Debora A. Davenport respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Third Circuit.

STATEMENT OF THE CASE

With one exception, respondents accept the petitioner's Statement of the Case.

Petitioner mischaracterizes the Court's reason for granting certiorari in Kelly v. Robinson, 479 U.S. 36 (1986). Certiorari was not granted in that case to determine whether a restitution obligation was a debt. Rather, as stated by Justice Powell in the opening paragraph of the Court's opinion in Kelly, review was granted to decide whether such obligations were dischargeable in proceedings under Chapter 7 of the Bankruptcy Code.

The instant case presents a question heretofore considered only by a single court of appeals. Unless and until there is a split among the circuits, the Court need not reach the issue.

REASONS WHY THE PETITION SHOULD BE DENIED

I. No Conflict Among The Circuits Is Created By The Ruling Of The Court Of Appeals

No other court of appeals has reached the question decided by the Third Circuit Court of Appeals below sub. nom. In re Johnson-Allen, 871 F.2d 421 (3d Cir. 1989); Pet. App. 1a-58a. Most of the other courts that have considered the issue have ruled in accordance with the Third Circuit that restitution is a debt which may be provided for in a Chapter 13 bankruptcy.[1/]

1/ In re Robinson, 776 F.2d 30 (2d Cir. 1985), rev'd on other grounds sub. nom. Kelly v. Robinson, 479 U.S. 36 (1986); In re Cancel, 85 B.R. 677 (N.D.N.Y. 1988); In re Heincy, 78 B.R. 246 (Bankr. 9th Cir. 1987) rev'd on other grounds, 858 F.2d 548 (9th Cir. 1988); In re Hackney, 83

Footnote continued.

The cases cited by the Commonwealth in its petition are not in conflict with the decision of the Court of Appeals. In U.S. v. Alexander, 743 F.2d 472 (7th Cir. 1984) and U.S. v. Carson, 669 F.2d 216 (5th Cir. 1982), the debtor had obtained a discharge of the underlying debt prior to the criminal trial that resulted in his conviction and sentence of restitution. Because the restitution order had not been entered prior to the discharge, it could not have been listed as a debt in the debtor's schedules. Therefore, the courts correctly

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B.R. 20 (Bankr. N.D.Cal. 1988); In re Cullens, 77 B.R. 825 (Bankr. D.Colo. 1987); In re Brown, 39 B.R. 820 (Bankr. M.D.Tenn. 1984); In re Holder, 26 B.R. 789 (Bankr. M.D.Tenn. 1982); In re Barnett, 15 B.R. 504 (Bankr. D.Kan. 1981); In re Hudson, 9 B.R. 363 (Bankr. N.D.Ill. 1981). Contra, In re Norman, 95 B.R. 771 (Bankr. D.Colo. 1988); In re Kohr, 82 B.R. 706 (Bankr. M.D.Pa. 1988).

concluded that the earlier discharge of the underlying debt in no way interfered with the sentencing court's prerogative to order restitution.

Nor is this a case involving a bankruptcy court's power to enjoin a state court criminal proceeding. As a result, the federalism concerns embodied in Younger v. Harris, 401 U.S. 37 (1971), are not presented. The courts below entered no coercive orders which would impede the Pennsylvania criminal courts from exercising their prerogative in administering the state criminal justice system.[2/] By comparison, the cases cited by petitioner both involved

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2/ The Third Circuit is appropriately sensitive to the principles of federalism and comity in bankruptcy matters which implicate the proper functioning of state criminal courts. See Matter of Davis, 691 F.2d 176 (3d Cir. 1982).

debtors seeking injunctions against state court proceedings.

In both McDonald v. Burrows, 731 F.2d 294 (5th Cir. 1984), cert. den. 467 U.S. 852 (1984) and Barnette v. Evans, 673 F.2d 1250 (11th Cir. 1982), the courts ruled that debtors were not entitled to an injunction of a state prosecution where the irreparable harm was speculative. The debtors had not been convicted, no restitution had been imposed and the bankruptcy court had not ruled on dischargeability. Moreover, as the Eleventh Circuit pointed out in Barnette, the debts at issue were not dischargeable under 11 U.S.C. §523(a)(2)(A). Barnette, 673 F.2d at 1252. Thus, these cases bear no similarity to the case at bar, where the state prosecution is long over and only declaratory relief under the Bankruptcy Code is sought.

II. The Court Of Appeals Correctly Ascertained The Intent Of Congress To Allow Debtors To Provide For Restitution Obligations In Chapter 13 Bankruptcy Cases

1. Where the terms of a statute are unambiguous, only the "most extraordinary showing of contrary intentions" from the legislative history would justify limiting the statute's plain language. Garcia v. United States, 469 U.S. 70, 75 (1984). Just last term, the Court declined to misread a statute "in order to reach a sympathetic result," pointing out that "Congress chose the language that requires us to decide as we do, and Congress is free to change it." Mansell v. Mansell, 109 S.Ct. 2023, 2031 (1989).

Petitioner would have this Court graft a judicial exception on to the Chapter 13 discharge provision, 11 U.S.C. §1328(a), for restitution

obligations. However, the Code clearly provides for the discharge of such obligations.

The Court of Appeals in this case followed the plain language of the Bankruptcy Code and correctly held that a restitution order is a debt that is dischargeable in a Chapter 13 bankruptcy. Contrary to the suggestion in the Commonwealth's petition, almost every court that has considered this question has agreed with the Court of Appeals.[3/]

The Court of Appeals correctly followed Congress' expressed intent that the term "claim", defined in the Code as a "right to payment," 11 U.S.C. §101(4)(A), is to be given the "broadest

3/ See n.1, supra.

possible definition."[4/] That this language requires restitution to be classified as a debt is a conclusion recognized even by courts holding restitution nondischargeable.[5/]

Contrary to the Commonwealth's statement at p.31 of its petition, the Court of Appeals did not agree with the Commonwealth's argument that the victim does not possess a right to payment. The Court of Appeals clearly held that there is a right to payment,

4/ H. Rep. No. 595, 99th Cong., 2d Sess. 309, reprinted in U.S. Code Cong. & Admin. News 5787, at 5963, 6266; S. Rep. No. 989, 95th Cong., 2d Sess. 21-22, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5807-08.

5/ In re Taite, 76 B.R. 764 (Bankr. C.D.Cal. 1987); In re Newton, 15 B.R. 708 (Bankr. N.D.Ga. 1981). See also, Kelly v. Robinson, 479 U.S. 36, at 56-57 (1986) (Marshall, J. dissenting).

irrespective of who may enforce that right. 871 F.2d at 425; Pet. App. 23a.

The Commonwealth argues that the Court of Appeals misconstrued the Pennsylvania restitution statute. In making this argument, the Commonwealth fails to consider how the restitution statute operates in practice. While the statute, 18 Pa.C.S.A. §1106, does not provide the victim with direct authority to enforce the restitution order, it requires that restitution be collected by the probation authorities and be forwarded directly to the victim. 18 Pa.C.S.A. §1106(e). It also preserves the victim's civil remedies. 18 Pa.C.S.A. §1106(g). Since the statute quite obviously contemplates that the victim be compensated for his loss, how can it be said that the victim has no right to payment? That the funds are

collected for the victim by a governmental unit does not alter the fact that there is an obligation to pay the victim. It is that obligation, as the Court of Appeals properly held, which gives rise to a "right to payment" under the Code.

Moreover, the gravamen of the Commonwealth's petition is that the Court of Appeals misconstrued Pennsylvania's restitution statute. Therefore, this petition raises an issue of local concern which does not merit this Court's review.

2. Having held that restitution is a debt, the Court of Appeals then proceeded to the inescapable conclusion that the debt is dischargeable. Congress expressly excepted governmental penalties from discharge in Chapter 7, 11 U.S.C. §523(a)(7), and just as

clearly did not do so in Chapter 13. 11 U.S.C. §1328(a).

> [B]ecause Congress has effectuated its policy of preventing the Code from becoming a "haven for criminals" by adopting appropriately restrictive language for specific provisions of the Code, ... its silence on this subject with respect to other provisions is equally telling and may not be discounted.

871 F.2d at 427-428; Pet. App. 35a-36a.

There are a number of reasons for Congress' different treatment of dischargeability in the two chapters. Whereas a Chapter 7 bankruptcy is a liquidation where creditors receive proceeds from the sale of any non-exempt assets, Congress designed Chapter 13 as a way for a debtor to financially rehabilitate himself and pay his creditors to the extent he can afford. The Chapter 13 debtor is required to

propose a plan in good faith[6/] whereby he submits all his disposable income for at least three years[7/] for the payment of allowed claims. Creditors are also entitled to receive at least as much as they would get in a Chapter 7 bankruptcy, i.e., the present value of all of the debtor's non-exempt property.[8/] 11 U.S.C. §1325(a)(4).

Moreover, the Code expresses a reasonable legislative policy providing an incentive to a debtor willing to submit his income over a lengthy period of time. That incentive is the entitlement to a discharge of debts that

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6/ 11 U.S.C. §1325(a)(3).

7/ 11 U.S.C. §1325(b)(1)(B).

8/ The Code specifically provides that governmental penalties are eligible for distributions from the debtor's estate. 11 U.S.C. §726(a)(4).

are not dischargeable in Chapter 7. In re Rimgale, 669 F.2d 426, 428 (7th Cir. 1982); 5 COLLIER ON BANKRUPTCY, ¶1328.01 at 1328-4 (15th ed. 1988).

Thus, the Court of Appeals rightly held that restitution is dischargeable in Chapter 13. By comparison, in Chapter 7 liquidations, as recognized by this Court in Kelly v. Robinson, 479 U.S. 36 (1986), courts historically refused to allow a discharge to affect the judgment of a state criminal court. The Court's "serious doubts" whether Congress intended to make criminal penalties debts, Kelly, 479 U.S. at 50, were based on a tradition of caselaw applicable only to liquidation cases.

In sum, Congress expressly codified the long-standing judicial exception to discharge of criminal penalties in

Chapter 7 only, at 11 U.S.C. §523(a)(7). Just as clearly, Congress did not include that exception in Chapter 13, 11 U.S.C. §1328(a). If that is a defect in the legislation, it is up to Congress, not the courts, to effect a cure. Mansell v. Mansell, 109 S.Ct. at 2031.

3. Not only was the holding of the Court of Appeals mandated by the plain language of the Code, it also has only a minimal effect on a state's interest in enforcing criminal statutes.

Nondischargeability is assured in Chapter 7 bankruptcies. In Chapter 13 cases, a restitution debt will be paid under the plan equally with other debts.

Moreover, contrary to petitioner's concern, the holding of the Court of Appeals will not require bankruptcy courts to reexamine factual questions or

to interpret state law previously decided in state criminal proceedings.[9/]

Finally, restitution is only one of an entire array of sentencing alternatives available to a court. Restitution in Pennsylvania is required under the welfare fraud law, 62 P.S. §481(c). As such, it is not a considered decision of the sentencing court, but automatically imposed, serving almost as a state law mandated collection device. However, there is no limit on other sentences that any court might devise in order to achieve society's dual interest in penalizing

9/ This Court's similar concern in Kelly, 479 U.S. at 48, was presumably based on a different dischargeability provision, 11 U.S.C. §523(a)(6), where different courts' standards of what is "willful and malicious" might complicate principles of issue preclusion.

and rehabilitating the offenders. Where the offender is indigent, for example, as is usually the case with recipients of excess public assistance, a court could order probation conditional on community service or a work program that benefits the victim. See Galaway, Toward the Rational Development of Restitution, in RESTITUTION IN CRIMINAL JUSTICE, 77, 80-81 (Hudson & Galaway, eds. 1977).

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

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